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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506.

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS, MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

Brief of the Respondent in Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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Table of Contents.

Argument 1

I. Respondent complied with the procedures promulgated by c. 31, § 20D of the Massachusetts General Laws governing the dismissal of a police officer serving a probationary period 1

II. Petitioner must establish a property or liberty interest contemplated within the due process clause of the Fourteenth Amendment before due process applies 3

III. Petitioner has no property interest in continued employment 3

IV. Reputation alone does not invoke the protection of the due process clause 4

V. Alleged falsity of testimony given at hearing does not enhance petitioner's due process claim 5

VI. Petitioner is not foreclosed from future employment 6

VII. Even if this court finds that petitioner was deprived of a property or liberty interest, petitioner was afforded due process 7

Conclusion 10

Table of Authorities Cited.

CASES.

Bishop v. Wood, 426 U.S. 341 (1976) 3, 4, 5, 6, 10

Board of Regents v. Roth, 408 U.S. 564 (1972) 3, 4, 6

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 9

Codd v. Velger, 429 U.S. 624 (1977) 6, 7

Mazaleski v. Treusdell, 562 F. 2d 701 (D.C. Cir. 1977) 6
Morrissey v. Brewer, 408 U.S. 471 (1972) 7
Mullane v. Central Hanover Trust Co:,339 U.S. 306 (1950) 7
Paul v. Davis, 424 U.S. 693 (1976) 3, 4, 5
Scott v. Manager State Airport, Hanscom Field, 336 Mass. 372, 145 N.E. 2d 706 (1957) 2
Sullivan v. Municipal Court of Roxbury District, 322 Mass. 566, 78 N.E. 2d 618 (1948) 2
Thibeault v. City of New Bedford, 342 Mass. 552, 174 N.E. 2d 444 (1961) 2
Vigoda v. Barton, 338 Mass. 302, 155 N.E. 2d 409 (1959) 2

CONSTITUTIONAL PROVISIONS AND STATUTE.

United States Constitution, Fourteenth Amendment 3, 4, 6, 11
Mass. G.L. c. 31, § 20D 1, 2, 4, 7, 9, 10
Mass. G.L. c. 31, § 43 5

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Argument.

I. RESPONDENT COMPLIED WITH THE PROCEDURES PROMULGATED BY C. 31, § 20D OF THE MASSACHUSETTS GENERAL LAWS GOVERNING THE DISMISSAL OF A POLICE OFFICER SERVING A PROBATIONARY PERIOD.

For a proper dismissal of a probationary police officer, c. 31, § 20D of the Massachusetts General Laws requires

that the employee be in a probationary period, and that he be given written notice stating in particular the reasons why his conduct, capacity or performance is deemed unsatisfactory to the appointing authority (Exhibit D, App. 17a-18a). The two material facts, namely that petitioner was serving a probationary period as a police officer in the City of Newburyport, and that he was given written notice of his dismissal, have been unquestionably established (Exhibit A and Exhibit B, App. 8a-12a).

The legal sufficiency of the notice given petitioner is evident from the face of the document (Exhibit A, App. 8a-10a). Technical precision is not required in such notices, *Sullivan v. Municipal Court of Roxbury District,* 322 Mass. 566, 577, 78 N.E. 2d 618, 622 (1948), nor is the validity of the notice required by c. 31, § 20D made conditional upon a copy being sent to the director of Civil Service. *Thibeault v. City of New Bedford,* 342 Mass. 552, 558, 174 N.E. 2d 444, 448 (1961).

Under Massachusetts law, the reasons for termination given by an appointing authority in a notice of dismissal must be taken as final on the facts. *Scott v. Manager State Airport, Hanscom Field,* 336 Mass. 372, 145 N.E. 2d 706 (1957). All the appointing authority must find is that the conduct or capacity of the probationary employee, or the character or quality of his work, is not satisfactory. The probationary employee has no right to challenge or question the appointing authority's judgment or reasons. *Vigoda v. Barton,* 338 Mass. 302, 155 N.E. 2d 409 (1959).

As a courtesy, petitioner was also offered notice and an opportunity to be heard (Exhibit B, App. 11a-12a). Petitioner accepted this offer. He now claims that this hearing violated due process.

It is submitted that petitioner was afforded more than due process due to the fact that petitioner was represented

by counsel who was present throughout the hearing; petitioner's attorney cross-examined his accuser; petitioner testified in his own behalf; and counsel for both the respondent and petitioner's accuser were also present.

II. Petitioner Must Establish a Property or Liberty Interest Contemplated within the Due Process Clause of the Fourteenth Amendment before Due Process Applies.

The issue is whether the Due Process Clause of the Fourteenth Amendment entitles petitioner to any greater procedural protection than was afforded him. A threshold requirement in a public employee dismissal case is that the petitioner show either that he has a legitimate entitlement to the job which would be protected as a property interest under the Fourteenth Amendment, or that his dismissal deprives him of a liberty interest protected by the Fourteenth Amendment. *Board of Regents v. Roth.* 408 U.S. 564 (1972), *Paul v. Davis,* 424 U.S. 693 (1976).

III. Petitioner Has No Property Interest in Continued Employment.

Petitioner admits no property interest in continued employment (Petitioner's brief at pp. 15, 16). The sufficiency of the claim of entitlement to continued employment must be decided by reference to state law. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Bishop v. Wood,* 426 U.S. 341, 344 (1976). In *Bishop v. Wood,* this Court held that a former policeman's employment status was not a property interest of which he had been deprived under the Due Process Clause of the Fourteenth Amendment, because North Carolina law gave no guaranty of continued employment either by statute or by contract. This Court declined to make an independent examination of the state law issue. Id. at 347.

Like the former policeman in *Bishop v. Wood*, petitioner held his position at the " 'will and pleasure of the city.' " Id. at 345. As a probationary employee, petitioner's position was terminable at the will of the respondent, the appointing authority of the City of Newburyport, if the conduct or performance of the employee was unsatisfactory pursuant to Mass. G.L. c. 31, § 20D. It is submitted that since petitioner cannot claim a legitimate entitlement to continued employment, he was not deprived of a property interest protected by the Due Process Clause of the Fourteenth Amendment.

IV. Reputation Alone Does Not Invoke the Protection of the Due Process Clause.

Since petitioner admits that he has no property interest in continued employment, he claims a property and liberty interest in professional and personal reputation. In *Paul v. Davis*, 424 U.S. 693, 701 (1976), this Court made clear that any harm to interest in reputation, even where inflicted by a state official, does not result in a deprivation of any property or liberty interest and therefore does not invoke the procedural protection of the Due Process Clause.

Reputation is not a candidate for special protection over and above other interests that may be protected by state law. Where the allegation is stigmatization by a state official, the remedy suggested by this Court in *Paul v. Davis* is a common law claim for defamation under state law. Id. at 698.

In *Board of Regents v. Roth*, this Court stated that it would stretch the concept of liberty too far to suggest that a person is deprived of liberty when he simply is not retained in one position, but remains as free as before to seek another. 408 U.S. 564, 575 (1972). In *Bishop v. Wood*, this Court extended the conclusion of *Roth* to the "discharge" of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge. 426 U.S. 341, 348 (1976).

As in *Bishop v. Wood*, the charges against petitioner were communicated to him privately in writing. In the letter, respondent informed the petitioner that although as a probationary officer he had no right to a hearing, as a courtesy to him, he would be given an opportunity to tell his side of the story at a hearing to be held for the tenured police officers involved, pursuant to Mass. G.L. c. 31, § 43.

The general outline of the complaint was made public only after the hearing, which petitioner agreed to attend, was underway. At the request of the respondent, the hearings were closed to the public in an effort to protect the petitioner's reputation. The outcome of the hearing, at which Mace was given the opportunity to testify and cross-examine his accuser either personally or by counsel, was made public only after the respondent had weighed all the evidence and had informed petitioner of the decision. In *Paul v. Davis*, shortly after the police had circulated a flyer listing the plaintiff as a shoplifter, the charges against him were dismissed. Although the criminal charges were false and publicly disclosed, this Court did not recognize reputation alone as a property or liberty interest.

V. Alleged Falsity of Testimony Given at Hearing Does Not Enhance Petitioner's Due Process Claim.

The alleged perjury of the sworn witnesses does not automatically invoke the procedural protection of the Due Process Clause unless petitioner can first establish the existence of a property or liberty interest. In *Bishop v. Wood*, since summary judgment was granted by the district court, this Court accepted the dismissed police of-

ficer's version of the facts. Therefore, this Court assumed that the policeman's discharge was a mistake because it was based on incorrect and false information. Furthermore, this Court held that the truth or falsity of the City Manager's statement about the police officer neither enhanced nor diminished the police officer's claim that his constitutionally protected interest in liberty had been impaired. *Bishop v. Wood*, 426 U.S. 341, 349 (1976). In *Codd v. Velger*, 429 U.S. 624 (1977), this Court held that since the district court had found that an untenured police officer had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failure to rehire him presents no federal constitutional question.

VI. Petitioner Is Not Foreclosed from Future Employment.

Petitioner does not allege that he is "foreclosed" from employment in other occupations or in his chosen profession. He merely alleges that the accusation against him "could 'seriously impair his right to secure other employment, more especially in the law enforcement field' " (Petitioner's brief at p. 13). In *Mazaleski v. Treusdell*, 562 F. 2d 701, 713 (D.C. Cir. 1977) petitioner there used similar language. The Court, citing *Roth*, stated that "to infringe one's liberty, the effect of government action . . . must extend beyond a disadvantage or impediment; it must 'foreclos[e] his freedom to take advantage of other employment opportunities.' "

The barrier of which petitioner complains is a practical one, not a legal one. *Mazaleski* at 713. Although it is possible that disclosure of the reasons for petitioner's discharge may interfere with his opportunities for subsequent employment, petitioner is not disqualified from engaging

in any of the common occupations of life, nor is he effectively deprived of a future possibility to pursue his chosen profession. Id. at 713. There is no Civil Service regulation which "forecloses" petitioner from seeking employment in other cities or towns. Nor is petitioner foreclosed from seeking police work in cities and towns where Civil Service regulations are not in force.

VII. Even If This Court Finds that Petitioner Was Deprived of a Property or Liberty Interest, Petitioner Was Afforded Due Process.

If this Court finds petitioner's alleged stigmatization constitutes a liberty and/or property interest, the question remains as to what process is due. It is submitted that petitioner was afforded due process under the circumstances of this case. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Notice and an opportunity to be heard must be appropriate to the nature of the case. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). The hearing required where a nontenured police officer has been stigmatized in the course of a decision to terminate his employment is solely to provide an opportunity to clear his name. *Codd v. Velger*, 429 U.S. 624 (1977).

Although under Mass. G.L. c. 31, § 20D, respondent could have dismissed petitioner without a hearing, in the spirit of justice and fair play, petitioner was afforded notice of the charges against him (App. 11a-12a) and a formal pretermination hearing at which he had the opportunity to tell his side of the story and to clear his name. The notice provided by respondent specifically states: ". . . as a

courtesy to you I want to give you every opportunity to present your side of the matter. You shall be allowed to answer the charges preferred against you either personally, or by counsel" (Exhibit B, App. 12a).

Petitioner's contention that the hearing was a "due process shambles" is completely without foundation. The hearing took place on April 8, 1979. Among those present at the hearing were petitioner and his attorney, Mr. David Downes, complainant Russell Janvrin and his attorney, Mr. Harvey Beit, and respondent and his attorney, City Solicitor James Lagoulis. At the outset, the respondent stated that the purpose of the hearing was to hear evidence on both sides. At respondent's request, the hearing was closed to the public and all witnesses were duly sworn and testified under oath. All testimony and proceedings of the hearing were taped with the assent of the parties. Petitioner was given the opportunity to testify, present exhibits and cross-examine the witnesses, including his accuser, Russell Janvrin. Each officer involved was given notice that he would be given an opportunity to answer charges against him either personally or by counsel.

The tapes disclose that it was agreed by the attorneys representing petitioner, petitioner's accuser and the respondent, that each officer's case would be heard individually. For this reason, only the officer whose case was being heard was present in the room when that officer testified. However, petitioner's attorney represented all three officers against whom charges were brought and was present in the room throughout the entire hearing. Petitioner's attorney cross-examined all of the witnesses, including petitioner's accuser who was cross-examined in the presence of petitioner. In addition, petitioner testified in his own behalf.

Among the witnesses were a physician and nurse from Anna Jaques Hospital who treated the complainant Russell

Janvrin on the night of the alleged misconduct. The complainant Janvrin presented as exhibits photographs taken the day after the alleged assault, which showed bruises on his face and legs, and a bill and physician's report from Anna Jaques Hospital.

When petitioner was absent from the room, petitioner's attorney objected to any questioning relevant to the charges against petitioner while petitioner was absent. This objection was sustained by respondent. Respondent then directed that the question objected to be stricken from the record and then directed the accuser's attorney to limit his questions to the charges against the officer present.

The purpose of the exclusion of petitioner in the manner described above was to give the respondent an opportunity to compare the testimony given by the officers involved, and thereby enable him to better determine its truth or falsity. This procedure, which was assented to by petitioner's attorney, was adopted to insure fairness and justice.

The nature of the hearing afforded petitioner struck an appropriate balance of the competing governmental and private interests involved. In determining what due process requires in a given situation, it is necessary to consider the governmental function involved as well as the private interest affected. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

The governmental function served by the police force is essential to the democratic process and to the safety of the community. The purpose of the probationary period of Mass. G.L. c. 31, § 20D is to enable the appointing authority of local governments to discharge police officers whose conduct, capacity or performance is deemed unsatisfactory. To require more procedural protection than is required by c. 31, § 20D or than was afforded petitioner in the case

at bar, is to frustrate the intent of the statute by making it impossible for local governments to make their own personnel decisions and by imposing an inordinate fiscal and administrative burden on cities and towns. This Court in *Bishop v. Wood* recognized that the ultimate control of state personnel decisions is and should remain with the States. Id. at 349, n. 14. "The federal court is not the appropriate forum to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood,* 426 U.S. 341, 349 (1976).

The record makes clear that respondent was not motivated by a desire to curtail or penalize the exercise of petitioner's constitutionally protected rights. In the absence of such a claim, "we must presume that the official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood,* 426 U.S. 341, 350 (1976).

Conclusion.

It is submitted that summary judgment was appropriately granted. The only two material facts in the present case are not in genuine issue. The first fact is that the petitioner was in his probationary period. The second fact is that the petitioner was given written notice of his dismissal stating in particular the reasons thereof.

For a proper dismissal of a probationary officer, Mass. G.L. c. 31, § 20D requires that the employee be in a probationary period and that he be given written notice stating in particular the reasons why his conduct or performance was deemed unsatisfactory to the appointing authority.

Since both requirements were satisfied it is appropriate that summary judgment was entered for the respondent as a matter of law.

In the spirit of justice and fair play, petitioner was also afforded notice and a hearing in which he was given every opportunity to be heard and to clear his name.

Even if this Court finds that the nature of petitioner's interest is one within the contemplation of the property of liberty language of the Due Process Clause of the Fourteenth Amendment and therefore some process is due, the record demonstrates that the petitioner was afforded more than due process.

It is submitted that the nature of the notice and the hearing afforded petitioner is well within the flexible scope of the due process protections demanded by this particular situation.

It is respectfully requested that this Court deny petitioner's request that a writ of certiorari issue to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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